FONG THIN CHOO, RE

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[ORIGINATING MOTION NO. 4 OF 1989]
29 APRIL 1991

ADMINISTRATIVE LAW: *Whether prohibition applies against a public officer - Whether exercising public duty - Whether failure to conduct full enquiry - Excess of jurisdiction - Extraneous considerations - Government Proceedings Act [Sing], s. 27 - Supreme Court of Judicature Act [Sing], s. 18(2).*

CUSTOMS AND EXCISE: *Export of dutiable goods - Removal from licenced warehouse - Imposition of customs duty - Meaning of 'export' - Duty of owner to provide evidence of export - Absence in legislation of meaning of 'evidence' - Evidence is not proof of export but the means of proof - Presumption of law when manifested goods are missing from vessel - Meaning of 'satisfaction' - Reasonableness or justification - Customs Act [Sing], ss. 27, 33, 41, 45 - Customs Regulations 1969 [Sing], Reg. 12(5), (6).*

On 12 December 1987, some cigarettes (the goods) were removed from a licensed warehouse and transported to the port area for loading on board a vessel (the said vessel). The removal and transport of the goods were approved and supervised by the Customs but the loading on board the vessel was not. What actually happened to the goods became the matter under dispute between the applicant and the Director General of Customs and Excise (DG). In accordance with regulations, the applicants delivered to Customs 3 Outward Declarations showing that the cigarettes had been loaded on board the vessel. The exporters named in two of the Outward Declarations were the applicants.

On 13 September 1988 the DG demanded payment of the customs duty because the applicant had not been able to produce proof of export. On 23 September 1988 the applicant's solicitors informed the DG that the goods had been exported and requested that the investigation be dropped. On 16 December 1988 the DG stated that the investigations revealed that the goods were not exported and requested payment of $130,241.30, being the sum lodged under several guarantees to secure payment of customs duties and taxes payable under the Customs Act.

On 30 December 1989, the applicant took out an *ex parte* application for leave to apply for an order of prohibition against the DG for calling on the banker's guarantee to satisfy his demand for payment of the said custom duty of $130,241.30.

At the hearing on 3 January 1989 for leave, State Counsel appeared and raised a preliminary objection as to the Court's jurisdiction to issue an order of prohibition against the government. Leave was however granted. State Counsel argued that since the Court could not grant an injunction against the government or any of its officers, it could not issue prohibition as it would have the effect of granting an injunction.

The applicants challenged the validity of the DG's demand on a number of grounds which may be summarised as follows:

(a) the DG failed to conduct a full and sufficient enquiry before making his decision on 16 December 1988;

(b) the decision was made pursuant to a wrong interpretation of the law and of the evidence founding it; he therefore acted contrary to law in disregarding the evidence put before him;

(c) the decision was in excess of his jurisdiction;

(d) the DG in purporting to make a decision was activated by or purported to be activated by extraneous considerations, namely, taking into consideration matters outside the scope of his jurisdiction.

Held:

[1] Section 27 of the Government Proceedings Act (which provides that an injunction cannot be granted against the government or any of its officers) does not apply to prohibition as s. 27 did not and was not intended to affect the Court's jurisdiction in judicial review proceedings. The jurisdiction of the High Court to issue the prerogative orders is preserved in s. 18(2) of the Supreme Court of Judicature Act. The test as to amenability to prohibition is whether the tribunal or authority concerned is exercising a public duty. The DG is a public officer appointed to discharge public duties under the Customs Act.

[2] The condition of "satisfaction" under Reg 12(6) of the Customs Regulations is not a matter of pure judgment or opinion as it is concerned with an inquiry as to fact. Whether dutiable goods have been exported or not exported, whether they are dutiable or duty has been paid and whether they are illegally landed are questions of fact. Whether that particular fact exists depends on whether it can be proved by evidence and not by believe. Under Reg, 12(6) the exporter has to produce evidence to account for the export in order to satisfy the DG.

[3] The decision of the DG that he was not "satisfied" on the evidence of the fact of export was in reality a decision, as a fact, that the goods had not been exported. The dissatisfaction should not a mere opinion or belief but should be grounded in evidence. This finding is subject to reversal on appeal if it cannot be justified, objectively, on the evidence.

[4] It is consistent with the statutory scheme to construe the expression "satisfaction" in Reg, 12(6) as not being measured in terms of reasonableness but in terms of justification on the evidence. In other words, Reg, 12(6) is a "precedent fact" case. The DG must establish the fact of non-export before the exporter becomes liable for customs duty. The function of the Court then is not to decide whether there was evidence on which the DG could reasonably have come to the decision but to decide whether the decision was justified by the evidence.

[5] On the affidavit evidence produced by the applicants, the DG could not reasonably have come to the conclusion the DG did without hearing the applicant's witnesses; he misdirected himself on the law as to the nature of the evidence required to be produced under Reg, 12(6) to prove the export of the goods. The inquiry and investigation had failed to take into account relevant considerations and had not been fair to the applicants.

[Leave granted; the applicant entitled to an order of prohibition against the DG.]

Cases referred to:

R v. Transport Secretary Ex p. Factortame Ltd. [1989] 2 WLR 997 ***(foll)***
R v. Criminal Injuries Compensation Board [1967] 2 QB 864 ***(cont)***
Secretary of State for Education v. Tameside MBC [1977] AC 1014 ***(cons)***
R v. Home Secretary Ex p. Khawaja [1984] 1 AC 74 ***(foll)***
Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 KB 223 ***(cit)***
Secretary of State for Employment v. Salef (No. 2) [1972] 2 QB 455 ***(cit)***

Legislation referred to:

Customs Act (Cap 70) [Sing], ss. 27, 33, 41, 45, 99
Customs Regulations 1979 [Sing], Reg 12(5), (6)

Government Proceedings Act (Cap 121) [Sing], s. 27
Rules of the Supreme Court [Sing], O. 53 r.1(3)
Supreme Court of Judicature Act (Cap 322) [Sing], s. 18(2)

For the applicant - Spencer Gwee
For the attorney-general - Jeffrey Chan (Tan Chee Meng with him)

JUDGMENT

Chan Sek Keong J:

This is an application in the name of one FTC, a director of Szetoh Import & Export Pte. Ltd. (the company) for an order of prohibition to prohibit the Director-General of Customs and Excise (the DG) from further proceeding to recover $130,241.30 "by deducting the said sum from the several bankers' guarantees, including No 15883347" which had been lodged by the said company with the Customs and Excise Department (the Customs) under s. 99 of the Customs Act Cap. 70 (Act) as security for payment of customs duties, taxes, fees, penalties and all other charges payable under the Act. For convenience, I shall hereafter refer to the company as the applicants as this application was taken out on their behalf.

The applicants have been carrying and continue to carry on the business of exporters and importers of general merchandise. In the course of their business, they had to provide security to the Customs to meet their liability for customs duty in respect of the goods they dealt in. During the period 1987-1988, they had provided security in the form of 3 bankers' guarantees totalling $410,000. In the course of these proceedings the guarantees expired and have been replaced by an irrevocable bankers' guarantee to meet any liability for customs duty payable to the DG.

On or about 12 December 1987, the applicants removed a large quantity of cigarettes (the goods) from a licensed warehouse and transported them to the port area of the Port of Singapore Authority for loading on board a vessel *MV Sempurna Sejati* (the vessel) for export. In compliance with regulations, the removal and transport of goods were approved and supervised by the Customs. But the loading of the goods on board the vessel was not supervised. What had happened to the goods is the bone of contention between the applicants and the Customs. In accordance with regulations, the applicants delivered to the Customs 3 Outward Declarations showing that the cigarettes had been loaded on board the vessel. The exporters named in two of the Outward Declarations were the applicants. The third Outward Declaration is the subject matter of another claim against another company.

Some months later, whilst in the course of reconciling Outward Declarations and ships' manifests supplied by shipowners or their agents, a customs officer discovered that the goods had not been entered in the manifest of the vessel supplied by a company called TTS who were the agents of the vessel.

Following this discovery, the DG wrote to TTS on 11 June 1988 for an explanation of the discrepancy within 2 weeks. On 20 June 1988, TTS replied that for the "particular trip, no berth was being applied nor any instructions given for loading by the ship operators EXCEPT some lubricating and motor oil ..." On 7 July 1988, TTS sent a further reply that "the goods which were declared by the exporter was NOT loaded onto the said *Sempurna Sejati*. The letter went on to say:

> We conclude our answer is reliable because we had checked with the ship owners, operators and its crew-members with regards to the goods so-declared which we were equally puzzled at sight of your letter of query! As explained earlier, our records obviously showed that no

berth was being applied for loading nor any instructions given for loading, no shipping orders taken by the exporters for cargo shipments EXCEPT some lubricating and motor oil which were loaded for ship-stores only".

On 21 July 1988, the DG wrote to the applicants and required that proof in the form of a mate's receipt or outward bill of lading or other documentary evidence that the goods had been exported be submitted by 28 July 1988. On 3 August 1988, the applicants replied and asked for time to furnish the mate's receipt as the shipowner was not in Singapore. On 19 August 1988, the applicants wrote to the DG and again asked for more time for the same reason.

In the meantime, on 22 July 1988, the DG forwarded to TTS a copy each of the Customs export permits which had been signed by one Kusmawanto as the Chief Officer of the vessel acknowledging the receipt of the goods on board the vessel. The time stated therein was 0900 hrs. TTS replied on 28 July 1988 and reiterated that they did not know anything about the alleged shipment. The letter went on to say:

(b) We had interrogated Mr. Kusmawanto whose rank is just an ordinary crew and not chief officer, after referring to your copies, who was very much puzzled on the acknowledgment. He said that he did not sign on the custom permits and he mentioned even if there is such cargoes received at the sea why would he want to sign knowing his limits as a crew and not an authorised person to receive the goods and especially in the presence of the master and the chief officer? In line with this, we had clarified with the ship owner, operators and the high rank crew-members who were very much surprised and claimed that they did not receive any goods at the sea (no berth was being applied for that voyage) and none of them has seen or acknowledge receipt for the goods.

On 13 September 1988, the DG wrote to the applicants that as they had not been able to produce evidence of export of the goods, they were required under Regulation 12(6) of the Customs Regulations 1979 to pay duty on the goods amounting to $130,241.30. The DG also offered to compound the offence for $2,000. On 19 September 1988, the applicants replied that they were still trying to contact the Chief Officer of the vessel. They however forwarded an undated document signed by one TKM, a Sibu businessman, certifying that he had on 15 December 1987 received the goods and had paid the sum of $146,940 as per invoice 16974 and copies of the relative invoice and receipt. The said letter contains the following notation of one ASC JM, a customs officer, made on 23 September 1988 as follows:

[The attached documents cannot be accepted as evidence that the goods were exported.]

On 23 September 1988, the solicitor for the applicants, SG, wrote to the DG reiterating his client's stand that the goods had been exported and requesting that the investigation be dropped. The customs continued with their investigations, the results of which were later disclosed in an affidavit filed in these proceedings. On 16 December 1988, the DG wrote to the applicants as follows:

Please treat my letter Customs C-2/8/Vol. III/(44) dated 13 Sep 1988 as cancelled.

2 Investigations revealed that the 178 ctns of assorted cigarettes declared in the above mentioned two Customs outward declarations were not manifested and were never loaded onto *Mv Sempurna Sejati*. You are therefore requested to pay customs duty amounting to **S$130,241.30c** on the 178 ctns of cigarettes.

3 Please pay up the said customs duty within 10 days from the date of this letter; otherwise we may initiate action to invoke your bank guarantee lodged with this department.

On 23 December 1988, the applicants replied, through their solicitors, as follows:

> We refer to your letter dated 16 December 1988 bearing abovementioned reference which was only received by our client on 22 December 1988 at 4.30 p.m.
>
> We are instructed to reply as follows:
>
> (1) Our client denies that the 178 cartons and 156 cartons of cigarettes were never loaded on board *MV Sempurna Sejati*.
>
> We are instructed that there is not a scintillia of evidence to prove that the cigarettes were never loaded.
>
> On the contrary the abovementioned 3 outward declarations 120799, 120800 and 120789 shows an acknowledgment by the chief officer that the cigarettes were placed on board on 12 December 1988 at 9 a.m.
>
> On 19 September 1988, our client had tendered to your department a certification letter from the buyer in Muara (Brunei) evidencing that the cigarettes were in fact exported and received. Further on 12 December 1988 the abovementioned 3 permits were returned duly endorsed by the chief officer and accepted by the customs permit section.
>
> On 23 September 1988, we had also written on behalf of our client (SG/ft/189/88/CL) reiterating our client's explanation.
>
> As the evidential burden is more than discharged by our client we are unable to understand how investigations reveal that the cigarettes were never loaded as alleged.
>
> Our client had arranged for the shipment of the cigarettes through the ship owner whose firm is now located in Batam Island.
>
> We are instructed that the Agent Thai Tong Shipping are not giving a full picture in regard to this transaction. The alleged fact that the cigarettes were not manifested is no concern of our client.
>
> Take notice that our client will be compelled to seek damages and other relief in Court should you proceed to take action as indicated in para. 3 of your letter. Should your department sue for the alleged duty leviable we have instructions to defend for the aforesaid reasons.

The DG replied on 28 December 1989 as follows:

> Please refer to your letter dated 23 Dec 1988.
>
> 2 We are satisfied from our investigations that the 178 ctns x 10 mille cigarettes vide the above two Customs Outward Declarations were never loaded on the vessel "Sempurna Sejati".
>
> 3 Please advise your clients to pay to the Director-General of Customs & Excise the duty on 178 ctns x 10 mille cigarettes amounting to a total of $130,241.30c by 4 Jan 1989.
>
> 4 If payment for the above duty recovery of $130,241.30c is not received by then, action will be taken forthwith to recover this sum from your banker's Guarantee lodged with this Department without any further reference to you.

In view of the terms of the letter of 28 December 1989, the applicants, on 30 December 1989, took out an *ex parte* application for leave to apply for an order of prohibition in OM No 198/89. Notice of the application was given to the Attorney-General in accordance with O. 53 r. 1(3). At the hearing on 3 January 1989 for leave, State Counsel appeared and raised a preliminary objection as to the Court's jurisdiction to issue an order of prohibition against the Government. I rejected the submission and granted leave. On 5 January 1989, State Counsel requested another hearing to put forward further argument. This was granted but at the further hearing State Counsel agreed that the jurisdictional issue be re-argued at the main hearing.

On the hearing date, State Counsel decided not to re-argue the issue of jurisdiction. However, as he has made a submission on it, I should give my reasons for having rejected it.

Jurisdiction

State Counsel's submission that this Court had no jurisdiction to issue an order of prohibition against the Government was based on s. 27 of the Government Proceedings Act Cap 121. It provides as follows:

> 27. (1) In any civil proceedings by or against the Government the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require:
>
> Provided that:
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between private persons be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
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> (b) in any proceedings against the Government for the recovery of land or other property the Court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.
>
> (2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

State Counsel argued that since the Court could not grant an injunction against the Government or any of its officers, it could not issue prohibition as it would have the effect of granting an injunction. No authority was cited for this proposition. If the argument were valid, it would follow that prohibition as a remedy against the Government had been abolished by s. 27 since its enactment. In my view, the argument was plainly wrong. Section 27 of Cap 121 affects "civil proceedings", which expression is defined to mean:

> Proceedings of whatever kind of a civil nature before a Court and includes proceedings for the recovery of fines and penalties and an application at any stage of a proceeding, **but does not include such proceedings as would in England be brought on the Crown side of the Queen's Bench Division.** (Emphasis is mine)

The crown side of the Queen's Bench Division is concerned with judicial review proceedings and not civil proceedings. Section 27 did not and was not intended to affect the Court's jurisdiction in judicial review proceedings. As Lord Bridge, who delivered the leading judgment of the House of Lords in *R v. Transport Secretary, Ex P Factortame Ltd.* [1989] 2 WLR 997 said at p. 1017:

> Injunctions were never available in proceedings on the Crown side invoking the ancient jurisdiction to issue the prerogative writs of mandamus, prohibition and *certiorari*...

Cap 121 was originally a Malaysian Act which was applied to Singapore in 1965 when Singapore was part of Malaysia. The Malaysian Act was based on the Crown Proceedings Act 1947 of the United Kingdom. The jurisdiction of the High Court to issue the prerogative orders is preserved in s. 18(2) of the Supreme Court of Judicature Act Cap 322.

Prohibition will issue against any inferior Court, tribunal or public authority to carry out any order or decision which is invalid under the law as being in excess of its authority to make. The principles applicable to certiorari to quash such an order or decision are equally applicable to prohibition. The law in this field has reached the stage where the test as to amenability to prohibition is whether the tribunal concerned is exercising a public duty. In *R v. Criminal Injuries Compensation Board* [1967] 2 QB 864, Lord Parker CJ, at p. 882, said:

> We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the board in my judgement comes fairly and squarely within the jurisdiction of this Court. It is, as Mr. Bridge said, "a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown." It is clearly, therefore, performing public duties.

The DG is a public officer appointed to discharge public duties under the Customs Act.

The application before me is to prohibit the DG from calling on the applicant's bankers' guarantee to satisfy his demand for payment of customs duty. The applicants now challenge the validity of the DG's demand on a number of grounds which may be summarised as follows: (a) the DG failed to conduct a full and sufficient enquiry before making his decision on 16 December 1988; (b) the decision was made pursuant to a wrong interpretation of the law and of the evidence founding it; he therefore acted contrary to law in disregarding the evidence put before him; (c) the decision was in excess of his jurisdiction; (d) the DG in purporting to make a decision was activated by or purported to be activated by extraneous considerations, namely, taking into consideration matters outside the scope of his jurisdiction.

Scope of DG's Statutory Powers

Before I consider submissions of Counsel and the evidence, I propose to examine the statutory scheme relating to the export of dutiable goods and the imposition of customs duty in relation to such goods. The scheme starts with s. 27 of the Act which provides that no dutiable goods as defined may be removed from customs control except (a) upon payment of customs duty, (b) under such conditions as the DG may impose for deposit in a Government warehouse or licensed warehouse, or (c) under such conditions as the DG may impose in any particular case. Section 33 provides that no person shall export dutiable goods except under and in accordance with such regulations or restrictions as are prescribed. Section 41 provides that within 48 hours of the departure of any ship, the owner or agent of the vessel shall furnish to the Customs "a full and correct outward manifest of all goods exported thereon or, which have been taken aboard the ship". The definition of the expression "export" is as follows:

> to take or cause to be taken out of the customs territory by any means or to place goods in any form of conveyance for the purpose of taking the goods out of the customs territory by any means to any place including a free trade zone:

Scope of Reg 12(6) of the Customs Regulations 1979

The removal of dutiable goods from licensed warehouses for export and the imposition of liability for duty for goods not exported are regulated by Reg 12(5) & (6) of the Customs Regulations 1979. Reg 12(5) deals with the removal of goods from a licensed warehouse, etc., for export and the provision of security. There was full compliance of Reg 12(5) by the applicants in relation to the goods.

Reg 12(6) is the material provision. It provides as follows:

> The owner of any goods removed under the provisions of this regulation or his agent shall, if so required by the proper officer of customs, **produce evidence that such goods have been exported or re-exported and shall pay the customs duty leviable on any part of such goods -**
>
> (a) **not accounted for to the satisfaction of the proper officer of customs; or**
>
> (b) if they are found to have been illegally re-landed in Singapore.

Meaning of "Evidence"

Reg 12(6) has two limbs. The first limb empowers a proper officer of customs (who I shall equate with the DG in this analysis) to require evidence of export of goods. It is not clear whether the power of the DG in this regard is limited only to determining whether what is produced to him is evidence or whether it extends to determining that the evidence is sufficient or otherwise to prove export. There is a great difference between the two cases. Neither the Act nor the Regulations defines the expression "evidence". It is not necessarily limited to evidence admissible in a Court of law as the DG is not conducting a judicial inquiry. The ordinary meaning of "evidence", in the context of proof of a fact, is any information obtained from documents, objects or witnesses which **may or tends to prove** the existence of the fact. But evidence has a range of probative values, depending on the nature of the evidence. It may range from the incredible to the conclusive. But so long as it is not inherently incredible, it is still evidence. Hearsay evidence is not as reliable as direct evidence. The oral statement of an interested party is not as reliable as that of a disinterested or independent party. Thus, an oral statement or a document showing that goods have been exported is, by itself, evidence of export in the wide sense given above. If it is believed by the person who is required to assess it in order to make a finding of fact, that evidence is **proof** of export. **Evidence** is not **proof,** but the **means of proof.**

If the DG's power under Reg 12(6) is limited to determining whether the material produced to him is "evidence" in the sense that I have used above, then the DG has no power to reject any evidence which is not inherently incredible because he thinks it is not believable. He must accept it as evidence for the purpose of Reg 12(6), and it is not within his power to decide whether the evidence is sufficient to prove export. The legal position will be the same even if there is conflicting evidence: it is not for him to resolve the conflict of evidence. This interpretation of "evidence" reduces the role of the DG very considerably.

The other interpretation of "evidence" in the context of Reg 12(6) is that the DG has a discretionary power to assess and evaluate **all** the evidence and decide whether such evidence is sufficient or otherwise to prove that goods have indeed been exported. This interpretation gives effect to the purpose of the second limb which provides the two situations giving rise to a liability to pay customs duty. I accept this as the correct interpretation of Reg 12(6). As the second situation is simpler for the purpose of exposition of the law, I shall consider it first. Where goods removed for export are **found** to have been re-landed illegally, the exporter **shall** (which, I think, means "is liable to") pay customs duty leviable on them. The word "found" is also ambiguous. Does it refer to a finding of fact by the DG? Or does it refer to the physical finding of the goods in Singapore without payment of customs duty? In contrast, s. 45 uses the word "found" in a physical sense. In my view, whatever the meaning of that word is, the illegal re-landing of goods is a fact. It is not a matter in the belief of the DG. That fact has first to be established, perforce, by the DG as he is making the demand for payment of customs duty. It is a "precedent fact" to be established. I shall discuss the rule on precedent fact later.

In my view, a comparison of the relevant words of this limb with s. 45 of the Act reinforces this conclusion. Section 45 provides that manifested dutiable goods which are found missing on board a vessel when it is in Singapore waters are, unless the contrary is **proved,** deemed to have been illegally removed and landed by the owner or agent of the vessel and he is liable to pay customs duty forthwith on the missing goods. Whether or not the missing goods have been legally removed and landed must be a fact to be established on the evidence and not to be established by an exercise of a discretionary power by the DG.

In the first situation, the exporter becomes liable for customs duty on dutiable goods or such part thereof removed for export which he cannot account for to the **satisfaction** of the DG. The word "satisfaction" ordinarily connotes a state of mind. If it has that connotation, does it refer to a subjective satisfaction? In *Secretary of State for Education v. Tameside* MBC [1977] AC 1014, Lord Wilberforce said, at p. 1047:

> The section is framed in a "subjective" form - if the Secretary of State "is satisfied". This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment.. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v. Salef (No. 2)* [1972] 2 QB 455, per Lord Denning MR, at p. 493.
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> The section has to be considered within the structure of the Act. In many statutes a Minister or other authority is given a discretionary power and in these cases the Court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the Courts cannot substitute their opinion for that of the Minister: they can interfere on such grounds as that the Minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at.

In the *Tameside* case, the legislation provided that

> If the Secretary of State is satisfied...that any local education authority ... have acted unreasonably with respect to the exercise of any power conferred ... under this Act, he may ... give such directions ...

The House of Lords held that he must have some factual basis for being satisfied that the local education authority in question had acted unreasonably.

Having regard to Lord Wilberforce's statement of the law, I do not think that the condition of "satisfaction" under Reg 12(6) is as a matter of **pure** judgment or opinion, for example, a judgment as to whether an orchestral performance is good or bad or a play is entertaining or not. Reg 12(6) clearly does not call for that kind of judgment as it is concerned with an inquiry as to a fact, that is, whether dutiable goods have been exported or not exported.

Lord Wilberforce also said that there was no universal principle on which the exercise of a discretion might be reviewed: each statute or type of statute must be individually looked at. This observation was prescient, as was demonstrated by the decision of the House of Lords in *R v. Home Secretary, Ex P Khawaja* [1984] 1 AC 74. In that case, the issue was whether an immigration officer had reasonable grounds for believing that the appellant was an "illegal

immigrant" as defined in order to detain him for deportion. One of the crucial issues in that case was the role of the Court in judicial review of cases of that type. Lord Wilberforce said, at p.105:

> The Court's investigation of the facts is of a supervisory character and not by way of appeal (it should not be forgotten that a right of appeal as to the facts exists under s. 16 of the Act of 1971 even though Parliament has thought fit to impose conditions upon its exercise). *It should appraise the quality of the evidence and decide whether that justifies the conclusion reached - for example whether it justifies a conclusion that the applicant obtained permission to entry by fraud or deceit.* An allegation that he has done so being of a serious character and involving issues of personal liberty, requires a corresponding degree of satisfaction as to the evidence. If the Court is not satisfied with any part of the evidence it may remit the matter for reconsideration or itself receive further evidence. It should quash the detention order where the evidence was not such as the authorities should have relied on or where the evidence received does not justify the decision reached or, of course, for any serious procedural irregularity. (emphasis added)

Lord Fraser describe the Court's role as follows, at p. 97:

> The second general issue relates to the function of the Courts and of this House in its judicial capacity when dealing with applications for judicial review in cases of this sort; *is their function limited to deciding whether there was evidence on which the immigration officer or other appropriate official in the Home Office could reasonably come to his decision (provided he acted fairly and not in breach of the rules of natural justice), or does it extend to deciding whether the decision was justified and in accordance with the evidence?* On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of an *ex facie* valid permission if the person is an illegal entrant. That is a "precedent fact" which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the Court must go beyond inquiring only whether he had reasonable grounds for his belief. In both the present cases the immigration officers stated, in what appears to be a standard formula, that there were "reasonable grounds to conclude" etc. That formula indicates, in my opinion, that they applied the wrong test, but as it happens, the facts in the present cases are so clear that I do not think the point is of practical importance. (emphasis added)

In the present case, the question I have to determine is what kind of legislation is the Customs Act. It is a law which imposes customs duty on dutiable goods imported into Singapore. It is a tax statute. Similarly whether such goods have been exported is a question of fact.Whether or not goods are imported or are dutiable or duty has been paid are largely questions of fact. Whether or not dutiable goods removed for export are illegally landed are questions of fact. Whether that particular fact exists depends on whether it can be proved by evidence and not by belief. Reg 12(6) provides that the exporter has to pay customs duty on dutiable goods which he cannot account for to the satisfaction of the DG. That requires the exporter to produce evidence to account for the export in order to satisfy the DG.

In the present case, the applicants produced the 2 Outward Declarations as evidence of export, but the authenticity of these documents, and therefore their probative value as evidence of export or loading on board the Vessel, was thrown into doubt by the manifest submitted by TTS. The DG caused to be carried out an investigation, at the conclusion of which he was not satisfied that the evidence produced by the applicants accounted for the export of the goods. Although the DG was not "satisfied" on the evidence of the fact of export, was he not, in reality, deciding as a fact that the goods had not been exported? The dissatisfaction

was not a mere opinion or belief but one grounded in evidence. In a forensic context, a Judge often makes a finding of fact by declaring that he is satisfied that on evidence fact A has been proved or established. By that, he means that the evidence supports the existence of fact A. That finding is subject to reversal on appeal if it cannot be justified, objectively, on the evidence. I think that it is consistent with the statutory scheme to construe the expression "satisfaction" in Reg 12(6) as having this meaning. The satisfaction is not to be measured in terms of reasonableness but in terms of jurisdiction on the evidence. In other words, Reg 12(6) is a "precedent fact" case. The DG must establish the fact of non-export before the exporter becomes liable for customs duty. The function of this Court in such a case is **not** to decide whether there was evidence on which the DG could **reasonably** have come to the decision (provided he acted fairly and not in breach of the rules of natural justice) **but** to decide whether the decision was **justified** by the evidence.

In this connection, I see no justification for treating a Reg 12(6) case as being more onerous to the exporter than a s. 45 case. A s.45 case is one where goods listed in ship's manifest are found missing on board whilst in a customs area, whereas a Reg 12(6) case is one where goods entered in an Outward Declaration as having been loaded on board a ship for export are not listed in ship's manifest. In substance, there is no distinction between them.

Counsel for the applicants has not, however, proceeded with his application on the basis that Reg 12(6) is a "precedent fact" case, although I did, in the course of argument, raise this point with State Counsel. Accordingly, I shall proceed to examine the applicants' case on the basis that it is a case where the DG has a discretionary power to decide whether the evidence produced by the applicants accounted for the export of the goods. The relevant test of the validity of the DG's demand is whether the DG could reasonably have come to his decision on the evidence before him. He must have a factual basis for making the evaluation, that is, for being dissatisfied. In the *Tameside* case, Lord Wilberforce, in making a distinction between a case of a pure judgment and a judgment based on an evaluation of the facts, also ruled that the Court was entitled to inquire into the existence of the facts upon which the evaluation was made. In the context of Reg 12(6), the factual basis must be whether the applicants had evidence which could account for the export of the goods. Accordingly, I turn now to an examination of the evidence produced by the applicants.

(a) *The Applicants' Evidence*

The applicants have filed a number of affidavits in support of their application. I now summarise their contents.

The first affidavit is that of FTC filed on 30 December 1988 pursuant to O.53 r. 1(2) of the Rules of the Supreme Court. She referred to the documents submitted to the customs and asserted as follows: (a) that they were sufficient to prove that the applicants had exported the goods; (b) that the only evidence to support the DG's allegation came from one PL of TTS who was then "at great odds" with her at that moment; (c) that PL knew that the shipment of the goods was made directly through MT, the shipowner; (d) that PL's ignorance of the actual shipment was not evidence that the goods had not been exported; and (e) that the fact that the goods were not manifested was not the concern of the applicants or PL but of the shipowner.

The second affidavit affirmed on 24 October 1990 by Tiong Kung Cheu, stated as follows: (a) that he was the sole proprietor of M/s. Tiong Brothers, Sibu; (b) that he had bought the goods from the applicants and had paid for it; (c) that on 12 December 1987 at about 10 p.m., he witnessed the goods being loaded/transferred on the high seas of Singapore from the vessel to another vessel, the *MT Tunda*; (d) that he had paid $7,000 freight to one **LYI**;

(e) that thereafter the goods were loaded on to another vessel, the *Hai Soon Lee*, which he had chartered; (f) that on 15 December 1987, the goods were delivered to TKM, the buyer. A copy each of the receipt for $7,000 and a cash voucher were produced.

The third affidavit, affirmed on 2 November 1990 by one TKC, a lighter operator, contained his statement (a) that on 12 December 1987, he received from one CAK and placed upon his lighter 334 cartons of cigarettes which were then carried to the vessel lying off the Western Anchorage and (b) that he witnessed the goods being loaded on board the Vessel at about 9 a.m. on 12 December 1987.

The fourth affidavit, affirmed on 2 November 1990 by one CAK, a driver employed by the applicants, stated as follows: (a) that on 11 December 1987 at between 12.45 p.m. to 4.55 p.m., he loaded onto lorries the goods from the licensed warehouses: (b) that the lorries carrying the goods were escorted by a customs officer to PSA Gate 5: (c) the goods were cleared at the PSA checkpoint; (d) that the goods were subsequently put on lighters and loaded on the vessel at about 9 a.m. within Singapore waters and that a Malay looking officer acknowledged receipt thereof; (e) that later MT, the shipowner, returned the 3 export permits to him and he submitted them to the customs.

The fifth affidavit, affirmed on 2 November 1990 by one JLHC, a labourer employed by the applicants contained his statement that on or about 11 December 1987 he was present and witnessed the loading of the goods on board the vessel at the Western Anchorage.

The sixth affidavit, affirmed on 30 October 1990 by one YYT, a Sibu businessman, stated as follows: (a) that on or about 11 December 1987, he had agreed with TKM and his partners to buy the goods from the applicants; (b) that TKM bought the goods on his behalf and paid for them; (c) that he had a 20% share in the goods for which he paid $29,388 to TKM and that on 15 December 1987, he received 20% of the goods which he then resold to a buyer in Sarawak.

The seventh affidavit, affirmed on 2 November 1990 by one CMQ, a director of the applicants, and filed in reply to the affidavit of 19 September 1989 of LBH, contained only one new statement, that CMQ had arranged directly with MT, the shipowner, to ship the goods on the vessel in Singapore (for which he had paid MT $2,000), that the goods were later loaded on the MT Tunda outside Singapore waters. He produced a copy of a Mates Receipt dated 12 December 1987 issued in the name of TTS. The named consignee was one WL.

The eight affidavit, affirmed on 13 November 1990 by CMQ, stated that the payment of $146,940 for the goods were remitted to the applicants' bankers through a Sibu bank. He produced copies of 4 advices of remittance dated 8 December 1987 (for $54,407.89), 8 December 1987 (for $34,127.45), 19 December 1987 (for $24,008.81) and 30 December 1987 (for $23,951.28), totalling $136,495.43. All the remittances were sent in the name of one CYS of Sibu.

The ninth affidavit, affirmed on 30 November 1990 by CMQ in reply to LBH's affidavit of 13 November 1990, recounted a series of incidents between FTC or the applicants and the customs which he alleged had influenced, adversely, the attitude of the customs towards the applicants. He also alleged that PL had an axe to grind and had refused to provide him with the manifest when he had asked for it.

(b) *The DG's Evidence*

The DG has filed three affidavits. The first, affirmed on 19 September 1989 by LBH, stated that his investigations showed (a) that the goods were not loaded on the vessel; (b) that Kusmawanto was not the Chief Officer of the vessel but one Fadhlie Makmud who had

confirmed that the goods were not loaded on board, and (c) that Kusmawanto had confirmed that he had not acknowledged receipt of the goods. Exhibited to LBH's affidavit were a copy each of the statutory declaration of Fadhlie Makmud (made on 6 December 1988) and or Kusmawanto (made on 17 November 1988) and the Crew List of the vessel for 9 December 1987.

The second affidavit, affirmed by LBH on 9 November 1990, stated that LBH has ascertained from PL of TTS (a) that the Mates Receipt was not genuine as its serial number 0041587 did not conform with the code used by TTS in respect of such documents; (b) that the voyage number 049D87 was incorrect, the correct number being 047D87, and (c) that the Mates Receipt was not signed by PL or his assistant TLE.

The third affidavit, also affirmed by LBH on 13 November 1990, disclosed the extent of his investigations before he came to the conclusion that the goods had not been exported. He also made the following statements: (a) that the vessel could not have received the goods aboard at 0900 hours Singapore time as it was at Tanjong Balai at 0535 hours Indonesian time and it would take 4 hours to reach Singapore by boat; (b) that Kusmawanto was a Chinese and did not look like a malay; (c) that the Mates Receipt was not endorsed by the Chief Officer or signed by any employee of TTS and therefore the signature thereon was a forgery; and (d) that the Customs had not received any evidence from MT.

Finding on State of the Evidence

The above affidavits filed by the parties disclose a serious dispute on whether the goods were exported. Much of the evidence now relied upon by the applicants does not appear to have been disclosed to the DG prior to the conclusion of his investigation. State Counsel has submitted that the Court should only consider the reasonableness of the DG's decision on the basis of the evidence before him in December 1988 and not have regard to the new evidence now produced by the applicants. His submission is that the DG's decision was reasonable as there was a bona fide inquiry into the matter.

In the circumstances of this case, I cannot accept State Counsel's submission. LBH had come to a decision as early as 13 September 1988 that the goods had not been exported. When the Applicants produced, on about 19 September 1988, the statement of TKM, accompanied with copies of sale invoices and a receipt for the goods, LBH resumed his investigations during which he presumably questioned Kusmawanto and the Chief Officer who then made their respective statutory declarations. This would account for the withdrawal of the DG's letter of 13 September 1988 in his letter of 16 December 1988. There is no evidence that between those two dates LBH sought to question TKM or such other witnesses that the applicants might have been able to produce. There is also no evidence that LBH had given any written warnings to the applicants that he was about to close his investigations. He was not under any time constraint to conclude his investigations. The applicants have complained that LBH was not interested in their evidence. Whether this complaint be true or not, the fact remains that the applicants have now produced ample evidence of export which has never been investigated by LBH.

But assuming that the Court is not entitled to have regard to the applicants' evidence produced after December 1988, what was the evidence that was produced by the applicants up to 16 December 1988 or 23 December 1988? The DG had before him (a) the statement of the applicants that they had arranged shipment of the goods directly with the shipowner, MT, that they had obtained the signed export permits from a person on board the vessel, that the goods was re-loaded on another vessel outside Singapore waters and shipped to

Sibu, and (b) the statement of TKM, accompanied with copies of invoices, that he had received the goods in Sibu and paid for them. The said statements and documents were evidence because they could prove the fact of export of the goods, and would prove that fact if believed by the DG. It was as good as evidence of export as the ship's manifest was evidence of non-export. Its probative value as proof of export depended on whether the DG was prepared to accept it. On 23 December 1988, the customs rejected TKM's statement and his supporting documents on the ground that it was not evidence of export the goods. No reason was given for this rejection. What they meant, of course, was that they did not believe TKM or his documents. They presumably did not believe TKM because they had interviewed PL, Kusmawanto and the Chief Officer of the vessel and their statements convinced them that neither FTC nor TKM could be telling the truth. But they did not ask to interview TKM or to examine his documents. In other words, they preferred the evidence which tended to prove non-export to evidence which tended to prove the contrary, without an investigation of the latter evidence.

In my view, LBH should have interviewed TKM to assess whether his evidence was credible. Absent that, it was not possible or reasonable to dismiss his evidence as not evidence of export of the goods. But TKM was not the only witness for the applicants. The applicants have identified many other witnesses who have now affirmed affidavits deposing to the removal of the goods from the licensed warehouse to the port area, from there onto a lighter, then on board the vessel, and then from the vessel to another vessel in international waters. In the light of the new evidence, the applicants' case is so much the stronger. There is no denial that LBH's investigating was not complete. If LBH had investigated TKM's evidence in September 1988, he might have believed it, and if he had done so, it would have accounted for the export of the goods, no matter that the manifest did not list the goods or that documentary evidence of loading had been issued. But, in fact, the applicants did produce a Mates Receipt on 12 December 1988. This caused LBH to investigate further, as a result of which he rejected the Mates Receipt as a forgery on information given by PL that no one in TTS had signed it and that the serial number did not confirm to the code by TTS. There is no evidence that CMQ, the deponent, was questioned by LBH on how he came to be in possession of the Mates Receipt and who issued it to him. Moreover, the applicants had given an account, albeit oral, which was capable of explaining away the discrepant manifest well as the "irregular" (in the sense that it was not issued by although in the name of TTS) Mates Receipt. Their explanation was that the loading was arranged not with the agents, TTS, but directly through the shipowner, MT, and that PL was not personally involved in the loading. This could also explain why Kusmawanto and the Chief Officer might not know about the shipment, assuming the truth of their statements. The fact that Kusmawanto had not signed the Outward Declarations did not mean that someone on board could not have signed it in that name. The applicants were not concerned about who signed them so long as they were signed. Similarly, the completion of the manifest was not within their control.

In making the above observations, I am not suggesting for one moment that the applicants' evidence is true or should be believed and that the evidence of the DG is untrue or should not be believed. What I do say is that the material produced by the applicants was evidence which LBH should have probed into thoroughly. On the face of it, there was inherent or necessary contradiction between the evidence accepted by LBH and the evidence of the applicants rejected by him. In my view, LBH placed undue weight on the discrepant manifest and the "irregular" Mates Receipt as evidence of non-loading. These are prima facie evidence of non-export but they can be rebutted, and the explanation given by the applicants was capable of rebutting non-export, as believed by LBH.

In my view, LBH misdirected himself on the nature and effect of the evidence required under Reg 12(6) to prove the **export** of the goods. This was a misdirection as to the law. He also failed to investigate fully the evidence produced by the applicants. He did not give a fair hearing to the applicants. LBH heard one side of the story without hearing the other side. The investigation was neither fair nor sufficient, even though it might have been carried out in good faith.

LBH in his affidavit of 13 November 1990 stated the vessel could not have been in Singapore at 0900 hours on 12 December 1987 (the time of loading given in the Outward Declarations) to load the goods as the vessel's log showed that the vessel was in Tanjong Balai at 5.36 a.m., as the trip from Tanjong Balai to Singapore would take 4 hours by boat. This statement, if true, would prove, in the first instance, that the time of 0900 hours stated in the Outward Declarations was wrong and also that it was not the time of loading. However, again, the applicants were never given an opportunity to challenge this evidence. I may add that this evidence was obtained by LBH long after he had concluded his investigation, and therefore it had no influence whatever on his conclusion. Assuming that the log entries were correct and also correctly entered, it is not obvious that they support LBH's conclusion that the vessel could not have been in Singapore waters at 0900 hours for the following reasons: firstly, there is no evidence on what speed would be required of a boat to make the journey from one place to the other in 4 hours, secondly, there is no evidence on the maximum speed the vessel was capable of in December 1987. Thirdly, although the log shows that the vessel took 4.10 hours to reach Tanjong Balai from Singapore, (starting at 0.120 hours and stopping at 0.530 hours), the speed of the vessel was not recorded. What was recorded was that during this journey, the vessel was stopped and checked 4 times by Indonesian customs, resulting in a total stoppage time of 32 minutes. That meant that an uninterrupted journey would have taken no longer than 3 hours 38 minutes. Thus, if the vessel had immediately started for Singapore at 0535 hours (the last entry in the log for 12 December 1987) and proceeded at the same speed as before, without having to stop, the vessel would have reached Singapore at not later than 0913 hours. But, if allowance were given for the time lost in having to slow down for the customs checks and in having to pick up speed after each check, it would not be inconceivable that the vessel could have been in Singapore by about 0900 hours. Finally, there is also no evidence from the maker of the log entries as to whether the time stated therein was Singapore or Indonesian time. The time of 4 hours given by LBH was based on the assumption that the maker had used the same time zone. This may or may not be the case. I should add that there is an unexplained entry for 0200 hours. The log entries are by no means self-explanatory. If they are relied upon by LBH as evidence of non-export, the applicants should at least be given an opportunity to test their accuracy or correctness.

As to the law, I have earlier referred to the statement of Lord Wilberforce in the *Tameside* case. I refer to another statement of the law by Lord Diplock in the same case, at p. 1065:

> ... it is for a Court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself property in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 KB 223, per Lord Greene MR, p. 229. Or, put more compendiously, the question for the Court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

To summarise my findings: (1) on the affidavit evidence produced by the applicants in these proceedings, the DG could not reasonably have come to the conclusion the DG did without hearing the applicants' witnesses; (2) he misdirected himself on the law as to the nature of the evidence that was required to be produced under Reg 12(6) to prove the export of the goods; (3) there was an insufficient inquiry by LBH resulting in his having failed to take into account relevant considerations; (4) the investigation was not fair to the applicants.

For the above reasons, the DG's demand was based on a decision made contrary to the law. The applicants are entitled to an order of prohibition against the DG in terms of their application.

Also found at [1991] 3 CLJ 2679